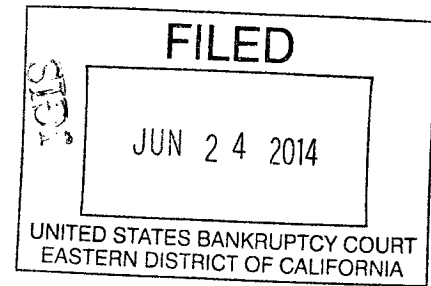


Richard Alan Ensminger
5401 Valhalla Drive
Carmichael, CA 95608
Phone: (916) 718-4467
E-mail: rickbk2013@gmail.com

Debtor-in-possession Richard Alan Ensminger



UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re RICHARD ALAN ENSMINGER,	) Case No. 13-35297
	) DC No. RAE-4
Debtor-in-possession.)
	) Chp. 11
<hr/>	
RICHARD ALAN ENSMINGER,	) Date: August 6, 2014
	) Time: 10:00 a.m.
Movant,)
	) Place: U.S. Bankruptcy Court
v.	) Robert T. Matsui United States Courthouse
	) 501 I Street, Sacramento, CA 95814
NATIONSTAR MORTGAGE, LLC,	) Courtroom 35, Department C
	) Judge: Hon. Christopher M. Klein
Respondents.)
)

EVIDENTIARY OBJECTIONS TO PROOF OF CLAIM 5 AND
THE DECLARATION OF LARRY E. JOHNSON

Richard Alan Ensminger ("Debtor" or "Movant") brings the following evidentiary objections to Proof of Claim 5 ("Claim 5" or "POC 5") and the Declaration of Larry E. Johnson ("Johnson") as a Representative of Nationstar Mortgage, LLC ("Respondent" or "Nationstar") included in Claim 5 based on the following:

1. Lack of authentication, lack of foundation, Hearsay, lack of personal knowledge, competence, confusion, speculation, best evidence. Fed. R. Evid. 403, 601, 602, 801, 901.

1 2. The purpose of a declaration is to provide “competent evidence supporting the”
 2 relief requested. *In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008). Competent evidence
 3 is required “so as to administer every proceeding fairly, eliminate unjustifiable expense and
 4 delay, and promote the development of evidence law, to the end of ascertaining the truth and
 5 securing a just determination.” Fed. R. Evid. 102.

6 3. *Lundell v. Anchor Const. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1039
 7 (9th Cir. 2000) (quoting *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991)); A
 8 court is not required to accept as true all evidence submitted by the objector. *Lundell*, 223 F.3d at
 9 1040, fn. 2.

10 4. Johnson offers absolutely no evidence into the record except self-serving hearsay.
 11 As will be discussed, no agency agreement in writing or otherwise is offered or described in
 12 detail. Nor is any exhibit or evidence provided to support Johnson’s hearsay statement that
 13 Nationstar Mortgage, LLC is the creditor. *Ricketts v. City of Hartford*, 74 F. 3d 1397, 1409-1410
 14 (2d Cir. 1996) (evidence has no probative value if it is not what the proponent claims it to be).
 15 Authentication requirements preclude the admission of documents into evidence that might be
 16 false or otherwise unreliable. *United States v. Perlmutter*, 693 F. 2d 1290, 1292-1293 (9th Cir.
 17 1982). The party offering the documentary evidence carries the burden of presenting sufficient
 18 evidence of authenticity. See *United States v. Pang*, 362 F. 3d 1187, 1192-1193 (9th Cir. 2004);
 19 see also *VFS Financing, Inc. v. CHF Express, LLC*, 620 F. Supp. 2d 1092, 1097 (C.D. Cal. 2009)
 20 (“Regarding authentication, evidence should be presented to prove the genuineness of the
 21 signatures or a declaration from the custodian of records laying a foundation for the document’s
 22 admission into evidence”). The Johnson statements referencing documents and information that
 23 have not been exhibited lacks authentication and should not be admitted into evidence.

24 5. Nationstar Mortgage, LLC has not established an exception under Fed. R. Evid.
 25 1004, nor has Wells Fargo, NA, as Trustee for the Holders of the Merrill Lynch Mortgage
 26 Investors Trust, Mortgage Loan Asset-Backed Certificates Series 2006-WMC1 (“Respondent”,
 27
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1 “Wells” or “2006-WMC1”) who claims to have timely filed Claim 5 (see Wells Trial Brief,
2 Docket #88, Page 2, lines 16 and 17 in the above captioned bankruptcy case).

3 6. The defects in the Movant's evidence are apparent. The Declaration of Larry E.
4 Johnson (hereinafter, “**Johnson Decl.**”) included in Claim 5, is testimony supporting that
5 Nationstar Mortgage, LLC is the creditor, yet the documents attached to the Claim 5 name other
6 creditors, including WMC Mortgage Corp. (“WMC”), Mortgage Electronic Registration
7 Systems, Inc. (“MERS”), and Wells Fargo Bank, N.A., as Trustee for the Holders of the Merrill
8 Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-
9 WMC1. Contradicting Johnson’s declaration is the statement from Wells that it is the secured
10 creditor and that Wells timely filed Claim 5. WMC is the named beneficiary under the Deed of
11 Trust attached to Claim 5 while MERS is named as both the beneficiary and the beneficiary’s
12 nominee.

13 7. The Johnson Decl. offers no information or evidence to support that Nationstar
14 has the right to any payments nor that it has an enforceable lien on the subject property
15 associated with the “secured claim”.

16 8. The Johnson Decl. is layers upon layers of inadmissible hearsay of which
17 Respondents have provided no business records exception for, which Respondents carry the
18 burden. Johnson refers to this alleged information, but provides no personal knowledge, such as
19 how he knew, when he knew, what he saw or touched, or whether he was told this information
20 from somebody else who knew it. Nor is evidence provided that Nationstar is a partner, servicer,
21 creditor, principal, agent, attorney in fact, assignee, assignor, indorser, transferor, transferee, or
22 in any other type of relationship or “joinder” with Wells or anyone else.

23 9. The Declaration of Larry E. Johnson (“Johnson Decl.”) is clearly deficient as it
24 fails to state when or how he gained knowledge of the particulars of the information and
25 documents attached to the Claim 5 and, while Johnson checked the box “I am the creditor”, his
26 title is “Rep. for Nationstar Mort., LLC and his company is “Weinstein, Pinson, & Riley, PS”
27 which is clearly not Nationstar, nor a creditor. Additionally no agency agreement or power of
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1 attorney is attached to Claim 5. Johnson appears to be a non-employee or non-officer of
2 Nationstar and has not provided a declaration that established how and under what circumstances
3 he has personal knowledge of any of the information or documents attached to Claim 5 nor has
4 Johnson provided any basis for an exception to the hearsay rule. Johnson has provided no
5 indication that in his capacity he reviews the particulars of each and every mortgage loan for
6 NATIONSTAR nor that this information, including these records are business records of
7 Nationstar. Johnson fails to state whether he monitors the file from its inception to present day
8 or how there can be multiple competing claims in regards to the claim. Johnson makes no
9 statement at all in regards to Wells, although some of the documents attached to Claim 5 name
10 Wells as a creditor, beneficiary or assignee.

11 10. The Johnson Decl. fails to state in his capacity as "Rep. for Nationstar Mort.,
12 LLC" the extent of his "hands on" and "factual" familiarity of the particulars of the day to day
13 review and maintenance of mortgage files for either Nationstar or Wells (both are claiming to be
14 the secured creditor and both claim to have filed Claim 5). The Johnson Decl. fails to state how
15 he knows the documents, if he was present at any transfer of papers, what he heard, what he saw
16 or what he was told.

17 11. The Johnson Decl. fails to state that Johnson has personal knowledge on his own
18 or how he acquired this knowledge. The Johnson Decl. failed to disclose that he was there,
19 heard, saw or whether he was told and he believes and therefore his personal knowledge means
20 he knows the people who told him of the facts. The Johnson Decl. lacks foundation because he is
21 not a competent witness to establish the authenticity of any of the documents nor the truth of the
22 matters asserted therein.

23 12. The Johnson Decl. fails to state how in his capacity as Rep. of Nationstar Mort.,
24 LLC, which handles tens of thousands of loan documents, Johnson's position as Rep. of
25 Nationstar Mort., LLC involved the review of loan documents, in a manner or period of time
26 sufficient to allow the Johnson Decl. to have any relevance to Claim 5.

1 13. In light of these deficiencies alleged here and the specifics and particulars in this
2 case the entire Johnson Decl. and Claim 5 do not meet the requirements of Rule 3001(f). The
3 Johnson Decl. does not support Claim 5, as Johnson clearly lacks sufficient knowledge to be
4 deemed a person most knowledgeable or even remotely provides sufficient statements to support
5 Claim 5.

6 14. Johnson is a "Rep. of Nationstar Mort., LLC", which means that he had nothing to
7 do with any of the facts related to Claim 5 and only became aware of the existence of the
8 documents and information in Claim 5 when he was called to execute Claim 5, including the
9 generic declaration included in the Proof of Claim coversheet. In fact he identifies himself as a
10 "Rep. of Nationstar Mort., LLC", a company whose function was to be legal counsel to
11 Nationstar (the Johnson Decl. fails to provide evidence that he ensured NATIONSTAR was
12 entitled to act as creditor). Johnson fails to show any evidence of the unfounded statement that
13 Nationstar is a creditor or that Nationstar is entitled to payment. Johnson has provided no
14 agency agreement in writing, nor any other document establishing his and his company's
15 relationship with Nationstar.

16 15. The Johnson Decl. fails to address that Nationstar's position directly contradicts
17 the assertions from Wells that it is the secured creditor.

18 16. Since Johnson makes a showing that he works for a law firm and not for
19 Nationstar, he is admitting that the law firm only has knowledge on their own as to matters that
20 occurred AFTER they received files or instructions and we ought to know which it was --- the
21 files or the instructions. Nationstar has produced no direct evidence of anything. Again, the
22 Johnson Decl. is fatally flawed and defective.

23 17. Since Johnson identifies his company as a law firm, without any foundation
24 whatsoever, he is admitting that the sole purpose of his company was to prepare Claim 5 without
25 any type of verification of Nationstar's actual relationship with Debtor and the estate.
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27
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1 18. The Johnson Decl. claims Nationstar is the creditor, but fails to attach any proof
2 of any financial transaction whereby Debtor became indebted to Nationstar or that Debtor owes
3 Nationstar any amount whatsoever.

4 19. Nationstar cannot be acting as an agent as they have identified themselves as the
5 creditor, neither can Wells be acting as an agent as they have also identified themselves as the
6 creditor. The note itself attached to Claim 5 defines NOTE HOLDER as: The Lender or anyone
7 who takes this Note by transfer and who is entitled to receive payments under this Note is called
8 the "Note Holder." Nowhere does Claim 5 show that Nationstar or Wells are entitled to receive
9 payments from Debtor. Nowhere does Claim 5 show an unbroken chain of transfers from WMC
10 to Nationstar, Wells or any other party.

11 20. The note attached to Claim 5 is not the obligation, but evidence of an obligation.
12 The underlying transaction is the debt, or the transfer of money from one party to another. The
13 Deed of Trust is incidental to the note. If there is no obligation and the note is invalid or paid in
14 full, there is no valid Deed of Trust (or the Deed of Trust is discharged). Claim 5 and the
15 attached documents are being used to establish the truth of the claim and are hearsay, of which
16 Nationstar nor Wells has established any exception for. Additionally Nationstar, Wells and
17 Johnson lack foundation to establish the existence of the underlying transaction of Claim 5 and
18 have not used the *best evidence* to establish any underlying transaction. Under the rules of
19 evidence, the note, deed of trust and assignment are secondary documents that imply that a
20 transaction took place but do not show facts to verify that the transaction actually occurred. The
21 *best evidence* of the underlying transaction is the canceled check or wire transfer receipt showing
22 the payment and implied acceptance of the money used to fund the loan or purchase the deed of
23 trust. These documents are necessary as it appears that Johnson, Nationstar and even Wells are
24 attempting to prove the contents of the documents attached to Claim 5 as the basis for their
25 claimed right to payment.

26 21. Johnson states "that the information provided in this claim is true and correct to
27 the best of my knowledge, information, and reasonable belief." This phrase is the only attempt at
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1 establishing personal knowledge or possibly an exception to the hearsay rule. The fact is that
2 somehow he saw documents without establishing how they came into his possession while who
3 the parties are (why are *they* not testifying?) and what knowledge *they* had, was not disclosed.
4 Nor do we know who prepared the documents in the file, what security was used for the posting
5 of data to the files, what security was employed in maintaining the security of the files and
6 finally we have no chain of custody for any of the files. This is layers upon layers of hearsay
7 without any valid exemption. The Johnson Decl. is fatally flawed and defective.

8 22. The documents attached to Claim 5 appear to be generated by computer, and a
9 person familiar with the computer system who can testify that the output is an accurate reflection
10 of the input must lay a foundation. *In re Vinhnee*, 336 B.R. 437, 2005 Bankr. LEXIS2602, 2005
11 WL 3609376 (9th Cir. BAP, Dec. 16, 2005). Among pertinent subjects of inquiry are "system
12 control procedures, including control of access to the pertinent databases, control of access to the
13 pertinent programs, recording and logging of changes to the data, backup practices, and audit
14 procedures utilized to assure the continuing integrity of the records." (Id., *25-26) In the *Vihnee*
15 case, "The trial court concluded that the declaration in the post-trial submission was doubly
16 defective. First, the declaration did not establish that the declarant was 'qualified' to provide the
17 requisite testimony. Second, the declaration did not contain information sufficient to warrant a
18 conclusion that the 'American Express computers are sufficiently accurate in the retention and
19 retrieval of the information contained in the documents.'" (*22-23). In this case Johnson has not
20 established any of the requirements in *Vihnee* and is unable to because he is not an employee of
21 Nationstar, Wells or any other creditor.

22 23. Johnson states in the declaration that his title is "Rep. of Nationstar Mort., LLC"
23 and that he does not work for Nationstar or Wells. This is an outright admission. He is saying
24 that he has been in the business a long time so looking at the records of the Debtor in this case is
25 like looking at the records of thousands of others where he made the same decision (but we must
26 emphasize that he undoubtedly did not and specifically does not say that he reviewed other
27 documents). It is an admission that he has NO PERSONAL KNOWLEDGE of the documents,
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1 that therefore the declaration is worthless, and that therefore the declaration is not the required
2 foundation for admission of the documents because he, the declarant, is not a competent witness.
3 While Johnson states an OATH, he does not have PERSONAL perception sight, hearing etc.,
4 MEMORY and the ABILITY to COMMUNICATE. In fact, Johnson has disqualified his entire
5 firm as a foundation witness since by their own definition (a law firm) they received the
6 documents after the bankruptcy was filed and after a decision was made by parties outside the
7 chain of title to file a claim in Debtors bankruptcy as a creditor.

8 24. Johnson has not stated that "he has personal knowledge of the accuracy of the
9 records" as he already essentially admitted that he doesn't and that he (a) received the documents
10 after the bankruptcy was filed and (b) relied upon his experience when he reviewed the
11 documents, and additionally fails to state who prepared the data or documents, how they were
12 kept, when they were kept, where they were kept and who was involved.

13 25. At no time does Johnson say that his company is not the creditor but he infers it
14 when he checked the box "I am the creditor" but then listed his title as "Rep. of Nationstar Mort.,
15 LLC" and his company as Weinstein, Pinson, & Riley, PS". By definition neither he nor his
16 company would be competent to testify to facts or documents or data that occurred PRIOR to the
17 time the petition was filed.

18 26. Based on the defects in the claimant's evidence, both Respondents have failed to
19 demonstrate that they have standing to file Claim 5 and the declaration attached to Claim 5. As
20 this court recently stated in its decision in In re Jackson, ___ B.R. ___, 2011 WL 2247816
21 (Bankr. E.D. Cal. June 6, 2011)(Holman, J.) in order to determine a party's standing in the
22 bankruptcy context, two inquiries are required. First, the court must determine whether the party
23 has constitutional standing, i.e. whether the party has suffered sufficient injury to satisfy the
24 "case or controversy" requirement of Article III. If the movant does not satisfy the first inquiry,
25 the court lacks subject matter jurisdiction to hear the matter. Id. at 2. Second, the court must
26 determine whether the party has prudential standing, i.e. whether the party is properly able to
27 assert a particular claim.

1 27. The Respondents in this case have not satisfied the first or the second inquiry.
2 First, the court should find that the Respondents have not presented sufficient evidence to
3 establish that they have constitutional standing because Respondents have not shown by
4 admissible evidence that either Respondent is the owner or has legal title of the Note (or the
5 underlying debt) – nor that Nationstar or Wells is a principal or agent duly authorized in writing
6 for the owner of the note or that Nationstar and Wells have joined properly in filing Claim 5 and
7 in their “dual” position as creditor. Second, the Respondents have not shown by admissible
8 evidence that they have prudential standing as the “person entitled to enforce” the Note, or as
9 their agent, duly authorized in writing, in any of the ways described in *In Re Jackson*.

10 28. Debtor has put at issue the underlying transfer of money (debt) allegedly
11 evidenced by the note, deed of trust and assignment attached to Claim 5.

12 29. Further, pursuant to California Government Code 27201 *et seq.*, none of the
13 recorded documents attached to Claim 5 has been determined to be legally sufficient by a Court
14 of competent jurisdiction. Respondents failed to include in Claim 5 any factual evidence proving
15 support for any of the preliminary recitals contained within these documents. See: *Tomczak v.*
16 *Ortega* 50 Cal. Rptr. 20, 240 Cal. App. 2d 902, “no substantial evidence to support such recital”
17 was found and the notice of default and subsequent trustee’s deed upon sale were determined as
18 void and of no legal effect for lack of evidence.” See: *Wolfe v. Lipsy* (App. 2 Dist. 1985) 209
19 Cal.Rptr. 801, 163 Cal.App.3d 633. *Quieting Title* 34(5); *Angell v. Superior Court (Verdugo*
20 *Trustee Service Corp.)* (1999) 73 Cal. App. 4th 691 [86 Cal Rptr. 2d 657]; *City of Los Angeles v.*
21 *Morgan*, 105 Cal. App. 2d 726 (1951) the court stated: “the purpose of the recording statutes is
22 to provide notice...whether valid or invalid...if invalid instruments are recorded, no notice is
23 given.” Debtor is entitled to valid notice under statute and was denied such valid notice by
24 Respondents.

25 30. As is clear in the Johnson Decl., Johnson knows nothing, saw nothing, heard
26 nothing and was never in any contract with borrower or anyone else as a servicer or creditor,
27 never handled any money, and posting, or anything else.

1 31. California Civil Code § 1550 states: “It is essential to the existence of a contract
2 that there should be: 1) Parties capable of contracting; 2) Their consent; 3) A lawful object; and,
3 4) A sufficient cause or consideration.” Wells (being a trustee of an unknown trust) has not
4 established that a trust exists, was constituted, and is capable of contracting. Neither Nationstar
5 nor Wells has shown any consent. No lawful object has been identified. And finally as has been
6 discussed previously, there is no evidence of a sufficient cause or consideration between any of
7 the parties.

8 32. California Civil Code § 1558 states: “It is essential to the validity of a contract,
9 not only that the parties should exist, but that it should be possible to identify them.” It has never
10 been established that Wells is a trustee or that the trust Wells is allegedly a trustee of exists. Nor
11 is it possible to identify the trust as no trust instrument establishing the trust and appointing
12 Wells as trustee has been attached to Claim 5. Wells is claiming to be a trustee and take actions
13 based on an alleged trust instrument. The proof that Wells is a trustee could only come from the
14 trust instrument. Further, the actions that Wells or any other party can take, including the ability
15 of Wells to institute any action or proceeding at law or equity (including filing Claim 5) exists in
16 such a writing and will show the conditions precedent to instituting an action or proceeding at
17 law or in equity (i.e. filing Claim 5). The *Best Evidence Rule* applies to the writings establishing
18 an alleged trust and allegedly appointing Wells as Trustee.

19 33. Debtors Motion for Sanctions pursuant to F.R.B.P. Rule § 3001 and 11 U.S.C.A.
20 § § 105 (“Motion in Limine”) are incorporated by reference into Debtors Motion to Disallow
21 Claim 5.

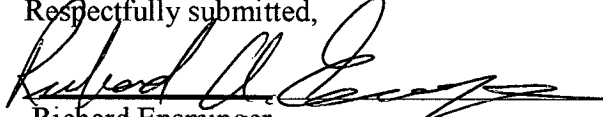
22 34. Debtors Motion for Disallowance of Claim 5 (“Objection to Claim”) is
23 incorporated by reference into Debtors Motion for Sanctions pursuant to F.R.B.P. Rule § 3001
24 and 11 U.S.C.A. § 105.

25 Accordingly, the declaration and information attached to Claim 5 should be not be
26 considered as evidence pursuant to, inter alia, Rule 3001(f) and the rules of evidence.
27 Additionally, pursuant to Rule 3001, any information and evidence not attached to Claim 5 that
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1 should have been attached to Claim 5 should be barred from use in any contested matter or
2 adversary proceeding in Debtors bankruptcy.

3 Dated: June 24, 2014

Respectfully submitted,

4 
5 Richard Ensminger,
6 Movant and Debtor-in-possession